Award No. 11011

Docket No. CLX-9845

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

RAILWAY EXPRESS AGENCY, INCORPORATED

STATEMENT OF CLAIM: Claim of the District Committee of the Brotherhood that

(a) The Agreement governing hours of service and working conditions between Railway Express Agency, Inc. and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, effective September 1, 1949, was violated June 1, 1956, in the Northern Texas-Louisiana seniority district in the treatment accorded J. C. Parker in refusing to permit him to return to work on his position on M-K-T Railroad Trains 25 and 6; and

(b) He shall now be permitted to resume work on his position on M-K-T Railroad Trains 25 and 6 and be compensated for salary loss sustained retroactive to and including June 1, 1956.

OPINION OF BOARD: Claimant Parker was injured after a derailment while on an assignment as a joint helper-baggageman for the Railway Express Agency on the M-K-T Railroad. As a result, Parker filed a personal injury suit against the Railway Express Agency and the Railroad. This suit was consolidated with an earlier similar suit against these Carriers. No final action was taken on these suits within the period in issue. About three months after the derailment the railroad's medical officer certified that Claimant was fit to return to duty. Parker then notified the Agency that he was ready to fill his regular assignment. However, the railroad blocked his return on the basis that he was an undesirable employe. Repeated and fraudulent claims were the reasons given for such refusal to permit the Claimant to work on this railroad. Claimant's seniority entitled him to bid on assignments with other railroads and the Agency was at all times willing to assign him to such other work. About three months after Claimant first notified the Agency that he was ready to work his regular assignment he accepted such other work. The claim here is that the Agency violated the Clerks' Agreement when it refused to permit Parker to return to work on his regular assignment with the M-K-T Railroad. Compensation for salary loss from the time Claimant indicated readiness to resume his regular assignment is claimed.

Essentially, the Employes argue that Claimant worked exclusively for the Express Agency and, accordingly, that all rights flow from the agreement between the Clerks and the Agency. The Agency maintains, however, that the Claimant was a joint employe of the Agency and the railroad and when the railroad refused to accept Claimant as an employe, the Agency was powerless to assign the Claimant to the position to which his seniority entitled him.

The equities seem to favor the Claimant but the law does not — at least on the record before us. The legal relations, of course, govern. The Employes simply have not made a case that any agreement, legal provision or doctrine of equity exists wherein the Express Agency has the power or authority, as an agent of the railroad, to compel the railroad to accept one of its employes to perform joint messenger work on one of the rail carrier's trains. The railroad was not made a party to this dispute; nor was the agreement between the Railway Express Agency and the railroad establishing an agency relationship introduced. Furthermore, it was not argued by the Employes that the Agency had power or authority to compel the railroad to accept **any** qualified employe. In the absence of such essential information, the argument of the Agency here that it was powerless to assign the Claimant to the work he was otherwise qualified and eligible to perform must be sustained.

In this respect we are mindful of the authority in two cases before the Federal Courts where awards of this Board, favorable to the Employes, were held to be incapable of enforcement because they were impossible of performance by the Agency. (**Brotherhood of Sleeping Car Porters vs. The Pullman Company** 5 L.C. 60919 and **Boos vs. Railway Express Agency** U.S. District Court, August 14, 1957, 153 Fed. Supp. 14, affirmed U.S. Court of Appeals, April 23, 1958, 34 L.C. 71, 457). Although the facts in these two cases do not compare directly with the facts in this dispute, the principle seems to be well established that an appeal to the Federal Courts for enforcement of an award of this Board under Section 3 First (p) of the Railway Labor Act will not be sustained if the Court is convinced that it is not possible for the carrier to execute the award. This seems to be the situation here.

Accordingly, we hold that this claim must be denied because the Employes have not shown how the Railway Express Agency can comply with a sustaining award. We do not hold that such a showing cannot be made under the facts involved — only that such a showing has not been made. Nor do we decide anything about the right of a railroad to choose its employes to perform work under its agreement with the Railway Express Agency.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1962.

LABOR MEMBER'S DISSENT TO AWARD NO. 11011, DOCKET NO. CLX-9845

While Award 11011 is not the only capricious award that has been rendered by this Division of the Board, it does reach a new time low in ridiculousness. I will show that the Referee's conclusions are based on unsupported inferences, false premises, illogical assumptions and misapplications of well established principles.

In the first paragraph under "Opinion of Board" the unsupportable contention is made that:

> "* * *, the railroad blocked his return on the basis that **he was an undesirable employe. Repeated and fradulent claims were the reasons given for such refusal to permit the Claimant to work on this railroad.** * * *." (Emphasis ours.)

It was pointed out to the Referee, in a re-argument in opposition to his proposed Award, that there was not a scintilla of evidence in the record that would support the erroneous conclusion that the railroad considered claimant an undesirable employe because he had filed repeated and fraudulent claims against the railroad, nor were such reasons given for refusal to permit him to work thereon. This absurd contention first appeared in Carrier Member's Memorandum, which was presented to the Referee in the original argument. Although this unsupportable argument arose from the figment of Carrier Member's fertile imagination, the Referee claimed there was sufficient information in the record to draw such an **inference.** The facts of record will show the fallaciousness of such a statement.

We know that inferences and facts are two different things. Inferences are compliant things, swaying to the whim of those who draw them, while facts can be harsh, unbending, and often block the selfish aims of those who must live with them; they do, nevertheless, carry a badge of legitimacy that no unsupported inference has been able to achieve. While we can understand why this unsupportable inference was drawn here by a Carrier Member, in carrying out his selfish aims, we are at a loss to understand how a referee could accept the inference as his own, when viewed in the light of the facts of record.

The facts are: In denying claimant's repeated requests to be allowed to return to his regular assignment, the Agency's Superintendent wrote him on June 14, 1956, stating:

"You are being held out of service on instructions of the Missouri Kansas Texas Railroad officials and as far as your status with the Railway Express Agency is concerned it has not changed.

We have not only requested but instructed to hold you out of service **pending some kind of agreement or understanding between your attorneys and MKT attorneys in connection with your suit for damages against the rail line and agency regarding an injury.**" (Emphasis ours.)

It is clear from the above quotes that the only reason that claimant was being withheld from his regular assignment, was because he had not agreed to a settlement of his law suit against the M-K-T Railroad on the latter's terms. If there are any inferences to be drawn here, it is that the M-K-T Railroad was attempting to force claimant to agree to the settlement proposed by the Railroad through coercion and intimidation. We should remember, however, that we have only the Agency's statement as to the Railroad's position in the matter, at no time did the Agency offer any evidence of a probationary character in support of its defense. Claimant had also sued the Agency and it is doubtful if its motives were above reproach. It is also interesting to note that the Agreement he was to sign provided for $7,500.00 in damages for physical injury and termination of all seniority rights. Not only was the Railroad and Agency guilty of duress in attempting to abridge the constitutional right of contract, they also denied Claimant's property rights without due process by withholding him from service. It is clear that this Division in Award 11011 has illegally sanctioned acts against public policy, as well as a denial of constitutional guarantees of rights to contract and due process, and I might add, based on an unsupportable "inference". Is it stretching logic too far to assume that if claimant was an "undesirable employe" because he had filed "repeated and fraudulent claims", he would have been so charged, investigation held under Rule 29 and dismissed by the Agency, if found guilty?

A review of the balance of the "Opinion" clearly reveals a lack of understanding of the **Railway Labor Act,** applicable law of contracts and fundamental principles that are well established. It is quite evident that the Referee was more concerned about the remedial part of the claim and the allegation that the Railway Express Agency could not comply with a sustaining Award.

I agree that the legal relations, as provided by the Act and the Collective Bargaining Agreement govern, I submit, however, that the decision is not based thereon. In the first place, the Agreement before the Board was between the Organization and the Railway Express Agency, the M-K-T Railroad was not a party thereto, nor was the Organization a party to any Agreement between the Agency and Railroad. While admitting to me in panel that "A" could not relieve himself of his contractual obligation to "B" by a separate contract with "C", the Referee still insisted that the Employes ("B") were bound by the Agency's ("A") contract with the Railroad ("C") and should have made it a party to the dispute because it was involved. While I did not agree with him, I stated that the obligation was upon him to give notice of the pendency of the dispute to the M-K-T in accordance with Section 3, First (j) of the Railway Labor Act, providing in part, here pertinent, that:

"* * * the Adjustment Board shall give due notice of all hearings to the employe or employes and the Carrier or Carriers **involved** in any dispute submitted to them." (Emphasis ours.)

this he failed to do. See Awards 8022, 8023, 8326, and 8328 among many others including the consistent position taken by Carrier Members on this subject.

Of course, the M-K-T railroad was not "involved" in the instant dispute and neither can it be properly ruled that the Agreement between the Organization and Agency was affected in any way by an Agreement between the Agency and M-K-T Railroad. See Third Division Awards 1233, 2088, 4161, 6712, 8266, Express Board of Adjustment No. 1, Decision E-333, between the same parties and First Division Award 20172.

In Award 1233, Referee Rudolph ruled:

"The Carrier contends that on account of an agreement it has with the Union Pacific System it is unable to comply with the present demand of Porter Lynch. **However, Lynch's rights must be determined by the agreement between the Pullman Company and Porters. Porters' rights cannot be determined by a contract, not made for their benefit, between the Pullman Company and a third party** in the absence of any agreement, express or implied, that such contract was to be binding on the Porters."
(Emphasis ours.)

Award 2088, Referee Tipton, held:

"* * *. Whatever rights this Carrier has at the tower is a matter between it and the Alton Railroad. The Petitioner is not a party to that contract, nor has the petitioner in any way adopted that contract. The mere fact that this Carrier's contract with the Alton Railroad antedates its contract with the petitioner would in no way make this agreement subservient to its contract with the Alton Railroad. See Awards Nos. 180, 323, 331, 951, and 1527."

In Award 4161, Referee Rader said:

"As a legal proposition the Organization was not bound by paragraph 14 of the Agreement between the Carriers. It would be necessary in order to so bind the Organization that it have actual notice of that provision of the Agreement and acquiesce in it. * * *."

In Award 6712, Referee Donaldson stated:

"We have twice refused to permit third party objections, standing alone, to defeat the orderly advancement of railroad employes to positions to which they aspire. Awards 1233 and 6373. * * * Once the third party right to dictate Carrier's personnel practices be conceded, opportunity exists for interference upon more serious grounds."

First Division Award 20172, Referee Seidenberg, is on all fours with the instant dispute and places in clear perspective the absurdity of the confronting Award. It was there held:

> "Following the accident, the two carriers conducted a joint investigation, and as a result thereof, the A.C.L. barred the claimant from performing services on its tracks. The Southern Railway Company imposed no sanctions against its employe. The A.C.L. subsequently lifted the bar and permitted claimant to resume service on its line. The claim here is for the difference between what claimant earned while barred from the A.C.L. and what he would have earned had he been permitted to work the assignment to which his seniority entitled him.
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> The claimant originally processed his claim against the Southern but that carrier denied liability on the grounds that it had not imposed any discipline against him. It suggested that the only recourse, if any, was to proceed against the A.C.L., the disciplining carrier. When the claimant pursued this course of action, the A.C.L. rejected the claim on the ground that it had no contractual relationship with the petitioner representing the claimant, and averred that, in the absence of such an agreement, there existed no basis for initiating or processing such a claim. In light of the foregoing, the claimant brought an action to this Division naming both carriers as respondents.
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> The Division now having determined that the claimant was not at fault and is entitled to be made whole, the question devolves as to which carrier should compensate the claimant.
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> The Division holds, after a review of the general statutes, contract law, and the prior awards of the Division (particularly Awards Nos. 4731, 5024, 5221, 9176, 9177, 12 113 and 14 497), that the Southern Railway Company should honor the claim.
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> The Railway Labor Act provides the first basis for liability on part of the employing carrier. Section 3 (i) of the Act, which established the National Railroad Adjustment Board, states, in part, the basis for the Board's jurisdiction, the following:
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> > '* * * disputes between an employe or groups of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.'
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> Therefore, for this Division to be able to act validly in accordance with its statutory mandate, it can only process claims arising out of the interpretation or application of agreements between the parties thereto, concerning rates, pay, or working conditions. There is such an agreement between the petitioner representing the claimant and the Southern Railway Company, but not between the claimant or his representative and the A.C.L. Consequently, on the record of this case, the claim against the A.C.L. must be dismissed.

The Southern Railway Company, as the party executing a collective bargaining agreement with the designated representative of the claimant, cannot exculpate itself from the obligations of this collective agreement by virtue of a separate agreement with a third party, i.e., the A.C.L. The A.C.L. was allowed to discipline the claimant by virtue of the Joint Trackage Agreement of 1902. The administration of this Trackage Agreement appears to permit a unilateral determination by the A.C.L. to bar Southern Railway employes from its tracks. The Southern Railway, in granting such right to the A.C.L., however, could not relieve itself of, or avoid, its contractual responsibility to its employes.

In accordance with the foregoing, the Division finds claimant should be paid, by the Southern Railway, for the difference between what he earned and what he would have earned during the period February 9, 1953, to May 19, 1953, as the result of being barred from service on the A.C.L. Railroad."

In the two arguments had before the Referee in this dispute, I specifically pointed out that if he was impressed by Carrier's argument that it was powerless to force the Railroad to allow claimant to run on its trains, that he could deny this remedial request and still sustain the Employes' claim that the Agreement was violated and award damages for all loss of wages and expenses until such time as he was properly returned to his regular assignment. Instead of following this well established principle, however, he attempts to place the enforcement of awards upon the employes by holding them responsible for an agreement between the Agency and Railroad. This is the first time that this Division has gone so far afield to deny a claim.

This Board has many times ruled that the remedial part of a claim is only incidental to the primary question to be determined.

In Award 5024, Referee Parker ruled:

"* * *, it was not intended by the Railway Labor Act that its administration should become super-technical and that the disposition of claims should become involved in intricate procedures having the effect of delaying rather than expediting the settlement of disputes. **The subject matter of the claim — the claimed violation of the Agreement — has been the same throughout its handling.** The fact that the reparation asked for because of the alleged violation may have been amended from time to time, does not result in a change in the identify of the subject of the claim. The relief demanded is ordinarily treated as no part of the claim and consequently may be amended from time to time bringing about a variance that would deprive this Board of authority to hear and determine it." (Emphasis ours.)

In Award 1646, Referee Blake ruled:

"* * * The essence of the claim is by the Organization for violation of the agreement. The claim for the penalty on behalf of North is merely an incident. * * *."

In Award 5078, Referee Coffey said:

> "* * *. The Board's primary function is to settle disputes involving fundamental differences between parties to an agreement, leaving to them the details of applying its awards."

It is so well established that the Board's jurisdiction is confined to disputes growing out of grievances or out of the interpretation or application of agreements (Section 3 (i) of the Act), while the enforcement of its awards have been reserved to the courts (Section 3 (p) of the Act), no further authorities are necessary in support thereof. However, a review of the "Opinion of Board" here makes it self-evident that the Referee was assuming the prerogative of the court in an enforcement proceeding, thereby evading the obligation placed upon him by Section 3 (h) to "make an award" on the merits of the dispute. In view of this, it is not necessary to comment on the two court decisions upon which the Referee relies in support of his unauthorized and erroneous conclusions, as they are irrelevant and immaterial to the question before the Board, which he failed and refused to answer.

It would be interesting to know upon what subterfuge the Referee would have resorted to had the Employes not included the request that Claimant "now be permitted to resume work on his position on M-K-T Trains 25 and 6" in Item (b) of their claim and instead had requested "relief" in the nature of reparations, i.e., wage loss and expenses until such time as he was restored to service thereon. You can rest assured that it would not have been long after such claim had been sustained that the Agency would have been able to prevail upon the Railroad to allow Claimant to operate on its trains in order to cut off the accumulation of damages.

Award 11011 was conceived in illegality and unauthorized assumptions, which renders it null and void. For that reason, I dissent.

/s/ J. B. Haines

Labor Member